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35169-6-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

COREY KNUDSVIG, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred in denying Knudsvig's motion to suppress.

2. The trial court erred in concluding that safety concerns justified the intrusive detention conducted in this case.

II. ISSUES PRESENTED

1. Whether law enforcement's objective rationale to protect their own safety supported their actions in requiring the defendant to exit a vehicle and identify himself, if, during the arrest of another individual associated with the van, an officer heard the vehicle's car door open, and observed a firearm drop to the ground from the vehicle?

2. Whether law enforcement had a reasonable suspicion under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), to require passengers of a vehicle to exit and identify themselves, based on a violation of RCW 9.41.050(2)(a), where an unconcealed firearm fell from the passenger vehicle door?

III. STATEMENT OF THE CASE

On September 17, 2016, at approximately 8:19 p.m., Deputy Clay Hilton was on routine patrol in the area of 2nd Avenue and Havana in the City of Spokane Valley. CP 34 (Finding of Fact 1). Deputy Hilton observed a white minivan parked at a residence known for frequent contact with law enforcement and which was a suspected drug house. CP 34 (Finding of Fact 2). Deputy Hilton ran the license plate on the minivan, as he does routinely as one of his regular duties, and discovered that the registered owner, Justin Millette, had outstanding warrants for his arrest. CP 34 (Finding of Fact 3).

Deputy Hilton then returned to the minivan, and observed a man standing outside the driver's side door; the man was identified as the vehicle's owner, Justin Millette. CP 34 (Finding of Fact 4). There were additional occupants in the vehicle; Deputy Hilton requested back up so that he could safely place Mr. Millette under arrest for his warrants. CP 34 (Finding of Fact 5). At the time, Deputy Hilton was unable to ascertain how many people were in the vehicle due to the dark tint on the windows, and the fact that the contact was made at night. 1/26/17 RP 31-32.

Deputy Hilton took Mr. Millette to his patrol car; while doing so, a passenger of the minivan exited the van's sliding door and Deputy Hilton heard a "thud." CP 34 (Finding of Fact 6). The deputy observed a handgun had fallen out of the minivan's sliding door and was on the ground. CP 34 (Finding of Fact 6).

Not knowing at that time whether the gun was real or fake, all occupants of the minivan were detained by law enforcement. CP 34 (Finding of Fact 7). Specifically, Deputy Van Patten, who had arrived on the scene, contacted Corey Knudsvig, who was in the back of the minivan; she ordered him out of the minivan because she could not see him from the outside due to the van's dark tinted windows. CP 35 (Finding of Fact 8). Mr. Knudsvig identified himself, and dispatch advised that Mr. Knudsvig had an active arrest warrant. CP 35 (Finding of Fact 8).

A search of Mr. Knudsvig incident to his arrest on the warrant revealed a small baggie, the contents of which tested positive for heroin. CP 35 (Finding of Fact 9). The gun that had fallen from the minivan was later determined to be a BB gun. CP 34 (Finding of Fact 6).

The defendant moved to suppress the fruits of the search of his person, claiming that he had been unlawfully detained. CP 5. After a CrR 3.6 motion hearing, the trial court entered the above findings of fact, and concluded: "Law enforcement detained Mr. Knudsvig after a handgun fell out of the minivan, causing a reasonable safety concern for law enforcement. Law enforcement did not know who possessed the gun, how many weapons may be in the vehicle, and could not see into the minivan due to the heavy window tinting. The area is a high crime neighborhood." CP 35 (Conclusion of Law 2). The trial court additionally concluded that "Mr. Knudsvig's detention and identification was lawful pursuant to *Terry v. Ohio*," CP 35 (Conclusion of Law 3), and "[a]fter determining that Mr. Knudsvig had a warrant for his arrest, the search was a valid search incident to arrest," CP 35 (Conclusion of Law 4).

Once the court entered its findings of facts and conclusions of law on the CrR 3.6 motion, the defendant and the State agreed to a stipulated facts trial before the court. CP 46-48. Based upon the facts submitted, the trial court found the defendant guilty of one count of possession of a

controlled substance – heroin. CP 53-55. On March 7, 2017, the trial court sentenced the defendant to a low-end standard range sentence of 12 months plus one day. CP 63-64. The defendant timely appealed. CP 74.

IV. ARGUMENT

IT WAS PERMISSIBLE FOR LAW ENFORCEMENT TO TEMPORARILY DETAIN AND IDENTIFY MR. KNUDSVIG TO ALLAY THEIR SAFETY CONCERNS.

Standard of Review.

The court reviews a trial court's denial of a motion to suppress to determine whether substantial evidence supports the challenged findings of fact and whether these findings support the trial court's conclusions of law. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). Where, as here, the defendant does not challenge any of the trial court's findings of fact, the court considers them to be verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). The court reviews conclusions of law de novo. *Mendez*, 137 Wn.2d at 214.

1. The trial court did not err in determining that law enforcement permissibly detained and identified Mr. Knudsvig to allay their safety concerns.

Mr. Knudsvig alleges that he was seized in violation of the Fourth Amendment to the United States Constitution and article 1, section 7 of the Washington Constitution when he was ordered out of a minivan and asked to identify himself during the arrest of another person associated with the

minivan, and after another passenger had opened the sliding door to the minivan, resulting in what appeared to be a firearm falling from the car to the ground.

When violations of both the federal and Washington State constitutions are alleged, it is appropriate to examine the State constitutional claim first. *Seattle v. Mesiani*, 110 Wn.2d 454, 456, 755 P.2d 775 (1988). This is because the federal constitution provides the minimum protection afforded to citizens against unreasonable searches and seizures, while the state constitution may afford greater protections. Thus, if the state constitution is satisfied, then the federal constitution is necessarily satisfied. *See, e.g.*, *State v. Surge*, 160 Wn.2d 65, 83, 156 P.3d 208 (2007) (Owens, J. concurring).

The Washington State Constitution protects individuals from unlawful searches and seizures. Wash. Const. art. I, § 7 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law.") Analysis under article I, section 7 requires the court to determine "whether the State unreasonably intruded into the defendant's 'private affairs.'" *State v. Flores*, 186 Wn.2d 506, 512, 379 P.3d 104 (2016); *Mendez*, 137 Wn.2d at 219. The analysis focuses "'not on a defendant's actual or subjective expectation of privacy but, as [the court has] previously established, on those privacy interests Washington citizens held in the past

and are entitled to hold in the future.'" *Mendez*, 137 Wn.2d at 219 (quoting *State v. White*, 135 Wn.2d 761, 768, 958 P.2d 982 (1998)). A violation of article 1, section 7, "automatically implies the exclusion of the evidence seized." *Flores*, 186 Wn.2d at 512 (quoting *State v. Afana*, 169 Wn.2d 169, 179, 233 P.3d 879 (2010)). "[A] warrantless search or seizure is considered per se unconstitutional unless it falls within one of the few exceptions to the warrant requirement." *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004).

First, the court determines whether a warrantless search or seizure occurred, and then, if so, whether it was justified by an exception to the warrant requirement. *Rankin*, 151 Wn.2d at 695. A person is seized when a reasonable person would have believed that he was not free to leave or to decline the officer's requests or otherwise terminate the encounter. *State v. Armenta*, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997); *see also State v. Brown*, 154 Wn.2d 787, 796-98, 117 P.3d 336 (2005) (holding that a passenger was clearly seized when he was asked to identify himself for investigative purposes so the officer could conduct a warrants and records check); *but see State v. Radka*, 120 Wn. App. 43, 83 P.3d 1038 (2004) (defendant was not under custodial arrest even though defendant was placed in patrol car and told he was under arrest). As acknowledged by the State during the CrR 3.6

hearing, Mr. Knudsvig was seized when he was ordered out of the minivan and requested to identify himself. CP 29.

The second inquiry is whether the seizure was lawful. Police are permitted all reasonable and necessary steps to assure their safety when performing official duties. *State v. Johnson*, 11 Wn. App. 311, 314, 522 P.2d 1179 (1974). At the same time, "[t]he principle that officers are entitled to take action to protect themselves must necessarily be tempered … by a respect for the personal security and privacy of individuals." *Id.* (quoting *State v. Toliver*, 5 Wn. App. 321, 326, 487 P.2d 264 (1971)). In determining whether there are sufficient facts to demonstrate a threat to officer safety, the standard is based on the reasonable police officer standard. *State v. Patterson*, 83 Wn.2d 49, 57, 515 P.2d 496 (1973). Therefore, the focus is on whether a reasonably cautious police officer, under the circumstances, would be justified in the belief that his safety, or that of others, was in danger. *Id.*

However, a "passenger[] [is] unconstitutionally detained when an officer requests identification 'unless other circumstances give the police independent cause to question [the] passenger[].'" *Rankin*, 151 Wn.2d at 695 (second alteration in original) (quoting *State v. Larson*, 93 Wn.2d 638, 642, 611 P.2d 771 (1980)); *see Brown*, 154 Wn.2d at 796. Although not present in *Rankin*, our Supreme Court suggested that an officer's request for

identification from a vehicle passenger may be permitted if reasonably related to officer safety issues. 151 Wn.2d at 699 n. 5. "If an officer felt his safety was at risk, he might need to know with whom he is interacting," *Id.* at 705 (Fairhurst, J., concurring) (describing circumstances that might justify an officer's request for a passenger's identification).[1]

To justify such a detention, officers must "articulate an 'objective rationale' to support their actions with regard to a passenger in order to prevent 'groundless police intrusions on passenger privacy.'" *State v. Parker*, 139 Wn.2d 486, 496, 987 P.2d 73 (1999) (quoting *Mendez*, 137 Wn.2d at 220). A rationale predicated specifically on safety concerns is satisfactory. *Mendez*, 137 Wn.2d at 220. An officer's objective rationale should be evaluated based on the circumstances present at the scene of the traffic stop, including: "the number of officers, the number of vehicle occupants, the behavior of the occupants, the time of day, the location of the stop, traffic at the scene, affected citizens, or officer knowledge of the occupants." *Mendez*, 137 Wn.2d at 220-21.

Here, based on these factors, the officers' objective rationale was sufficient to order passengers out of the van, briefly detain them and request

[1] And, an officer's request for a passenger's identification, without more, is unlikely to result in a Fourth Amendment seizure. *Armenta*, 134 Wn.2d at 11.

their identities. The detention occurred in a high crime neighborhood, outside of a suspected drug house. The passengers were in a minivan with windows so darkly tinted that officers could not see the occupants, or determine how many occupants there were. What appeared to be a firearm fell from the passenger door of the vehicle when one of the passengers opened the door. Officers were legitimately concerned for their safety or that the passengers may have had access to other weapons.

Under *Mendez,* law enforcement was justified in requiring the defendant to exit the minivan and identify himself because those actions were based on objective, legitimate safety concerns. Officers did not know whether any of the other occupants of the minivan were armed,[2] or "with whom they were interacting." They did not know whether any of the individuals inside the minivan had access to other firearms, as officers are trained to assume that, "where there's one weapon, there's two." "Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are

[2] "[T]hrough training you're always told that where there's one weapon, there's two weapons, and until you can confirm for yourself if a person is not armed, you would assume they are, for safety reasons." 1/26/17 RP 24.

wounded. Virtually all of these deaths and a substantial portion of the injuries are inflicted with guns and knives." *Terry*, 392 U.S. at 23-24. Based on these facts, law enforcement's safety concern was an objective rationale supporting the brief detention and identification of Mr. Knudsvig.[3]

2. Law enforcement had an independent basis upon which to detain all individuals in the minivan pursuant to *Terry v. Ohio*.

The significance of what appeared to be a firearm falling from the vehicle to the ground cannot be overstated.[4] Despite citizens' rights to possess and carry firearms under the Second Amendment to the United States Constitution or article 1, section 24 of the Washington State Constitution, those rights are subject to regulation. For instance, under RCW 9.41.050(2)(a), "a person shall not carry or place a loaded pistol in any vehicle unless the person has a license to carry a concealed pistol and (i) The pistol is on the licensee's person, (ii) the licensee is within the vehicle at all times that the pistol is there, or (iii) the licensee is away from

[3] *See, State v. Cousins*, 2013 WL 1489473, 174 Wn. App. 1035 (April 9, 2013) (unpublished decision) (holding that identification of passenger of vehicle was a lawful seizure based on officer safety concerns); *see also* GR 14.1 (a). Under GR 14.1, a party may cite to an unpublished decision of the Court of Appeals filed on or after March 1, 2013. Unpublished opinions of the Court of Appeals have no precedential value, are not binding on any court, and may be accorded such persuasive value as the court deems appropriate.

[4] Despite the fact that the firearm was later discovered to be a BB gun, and was not a real firearm.

the vehicle and the pistol is locked within the vehicle and concealed from view from outside the vehicle." A violation of this section is a misdemeanor. RCW 9.41.050(2)(b).

When Deputy Hilton observed a firearm fall to the ground from a vehicle, he would have had a basis upon which to believe that RCW 9.41.050(2)(a) had been violated: (1) a pistol was in the vehicle; (2) it was not on a licensee's person; and (3) it was not concealed from view. Thus, law enforcement had an independent ability to detain the occupants of the vehicle to investigate a violation of RCW 9.41.050, and whether there was, in fact, an individual who was validly licensed to carry a concealed pistol.

This detention of the individuals associated with the minivan from which the pistol fell is valid under *Terry*. 392 U.S. at 21. Under *Terry*, officers may briefly, and without a warrant, stop and detain a person they reasonably suspect is, or is about to be, engaged in criminal conduct. *E.g.*, *Mendez*, 137 Wn.2d at 223. A *Terry* stop or detention is a recognized exception to the warrant requirement under both the federal and state constitutions. *See, e.g., State v. Duncan*, 146 Wn.2d 166, 173, 43 P.3d 513 (2002) ("we agree, that Duncan was thus seized under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington State Constitution. For that seizure to be lawful, it must be

either (a) based on a reasonable suspicion of criminal activity, in accordance with *Terry* principles, or (b) a proper detention to issue a notice of a civil infraction"[5]). An appellate court may affirm the trial court on any basis the record supports. *See, In Re Detention of McGary*, 175 Wn. App. 328, 337, 306 P.3d 1005 (2013). In addition to the officers' legitimate officer safety concerns, they had a legitimate basis for which to conduct a *Terry* investigative stop.

V. CONCLUSION

The State respectfully requests that the court affirm the trial court and the defendant's conviction.

Dated this 18 day of December, 2017.

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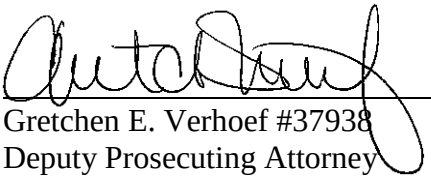

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[5] In *Duncan*, the Court then determined that civil non-traffic infraction was insufficient to legitimize the seizure.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent, v. COREY KNUDSVIG, Appellant.	NO. 35169-6-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on December 18, 2017, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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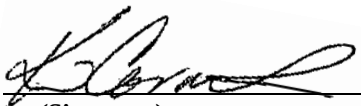
12/18/2017 **(Date)** Spokane, WA **(Place)**  **(Signature)**

SPOKANE COUNTY PROSECUTOR

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